LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
AUG 14 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

NO. 375

ST. PAUL FIRE AND MARINE INSURANCE COMPANY ..... *Petitioner*

v.

WILLIS P. COLEMAN, ET AL. ..... *Respondents*

PETITION FOR A WRIT OF CERTIORARI

TO

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ALSTON JENNINGS

1600 Tower Building
Little Rock, Arkansas

Counsel for Petitioner

PARAGON PRINTING CO., LITTLE ROCK

INDEX

	Page
Citations To Opinions Below	2
Jurisdiction	2
Question Presented	2
Statement	2
Reasons For Granting Writ	5
Conclusion	12
Appendix A — Judgment Of United States District Court	13
B — Opinion Of Court Of Appeals	14
C — Judgment Of Court of Appeals	23
D — Appellant's Petition For Rehearing	24
E — Order Denying Rehearing	32

CITATIONS

Cases:

Standard Accident Insurance Company v. Roberts, 132 F. 2d 794 (8 Cir. 1942)	10
Dixie Furniture Company v. Central Surety & Insurance Company, 173 F. Supp. 862 (D.C. Ark. 1959); affirmed 272 F. 2d 190 (8 Cir. 1959)	10
Tidewater Associated Oil Co. v. Northwest Casualty Co., 264 F. 2d 879 (9 Cir. 1959)	10
Bitts v. General Accident Fire & Life Assur. Corp., 282 F. 2d 542 (9 Cir. 1960)	10, 11

Statutes:

28 U.S.C., Section 1254 (1)	2

Rules:

Rule 19 (b), Rules Of The Supreme Court Of The United States	2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

NO. .....

ST. PAUL FIRE AND MARINE INSURANCE COMPANY ..... *Petitioner*

v.

WILLIS P. COLEMAN, ET AL. ..... *Respondents*

PETITION FOR A WRIT OF CERTIORARI

TO

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, St. Paul Fire and Marine Insurance Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on April 19, 1963. The respondents are Willis P. Coleman and Anne Wyles Colemian d b a Lake Hamilton Marine Service, Morgan Agar, James E. Stover, Sr., William T. Stover II, James E. Stover, Jr., Vicki Ann Stover, Joe G. Fetzek, Virginia M. Fetzek, Mary Catherine Fetzek, Virginia Linda Fetzek, Joseph P. Fetzek, and William T. Stover.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court (R.23A) is reported in 204 F. Supp. 713. The judgment thereon (R.43) is printed in Appendix A hereto, *infra*, p. 13. The opinion of the Court of Appeals (R.1A), printed in Appendix B hereto, *infra*, p. 14, is reported in 316 F.2d 77.

JURISDICTION

The judgment of the Court of Appeals was entered on April 19, 1963 (R.10A), printed in Appendix C hereto, p. 23, *infra*. Petitioner served and filed timely petition for rehearing on May 8, 1963 (R.11A), printed in Appendix D hereto, *infra*, p. 24. Rehearing was denied on May 20, 1963 (R.19A), printed in Appendix E hereto, *infra*, p. 32. The jurisdiction of this court is invoked under 28 U. S. C., Section 1254 (1), and its amplification in Rule 19(b) of this Court.

QUESTION PRESENTED

Whether an insurance policy provides coverage on the basis of the undisputed facts in this case.

STATEMENT

The petitioner insurance company filed an action for declaratory judgment in the District Court, seeking a declaration that its Manufacturers' and Contractors' Liability insurance policy issued to Willis P. Coleman and Ann Wyles Coleman, d/b/a Lake Hamilton Marine Service did not apply to claims and litigation arising out

of an occurrence resulting in personal injuries. Jurisdiction of the District Court was invoked because of federal jurisdictional amount and diversity of citizenship.

On June 6, 1961, during the policy period, an inboard motorboat operated by William T. Stover caught fire and burned on Lake Hamilton near Hot Springs, Arkansas. As the result of injuries to the eight occupants of the boat, suits were filed against Lake Hamilton Marine Service and Morgan Agar, an employee, it being alleged that the fire and resulting injuries were caused by the negligence of Morgan Agar imputable to Lake Hamilton Marine Service.

Lake Hamilton Marine Service contended that petitioner St. Paul Fire & Marine Insurance Company was obligated, under its policy, to defend the lawsuits arising out of the occurrence and to pay judgments that might be rendered, subject to policy limits. St. Paul denied that the occurrence was covered by the policy issued.

Prior to the fire, William T. Stover operated his boat to the Lake Hamilton Marine Service's dock for the purpose of getting gasoline in the boat's tank. Morgan Agar handled the refueling from a gasoline pump. After the refueling, Stover started the boat and pulled away from the dock and it was stipulated that the boat was seventy-three feet from the dock when it caught fire and burned (R.22).

The injured parties contend that Agar, in removing the cap from the gas tank on the boat, negligently disconnected the pipe between the cap and the tank so that a portion of the gasoline delivered from the pump was allowed to run down into the bilge of the boat, rather than going into the fuel tank. For the purpose of the

declaratory judgment action only, it was agreed that the Court might consider that contention as being true (R.22).

The type of coverage known as "Manufacturers' and Contractors' Liability" is one of general use in the insurance industry. Petitioner's policy consists of a form designed so that an insured may purchase liability coverage under any one, or more, of four classifications, or divisions. These divisions ("Item 3." under "DECLARATIONS"; and "Definition of Hazards." under "INSURING AGREEMENTS") are classified as "1. Premises-Operations"; "2. Elevators"; "3. Independent Contractors"; and "4. Products-Completed Operations" (R.11).

Coleman elected to purchase coverage only under the division designated as "Premises-Operations" and was, therefore, provided with coverage only for liability arising out of "The ownership, maintenance or use of premises, and all operations". He did not elect to purchase coverage against the "Products-Completed Operations" hazard. The policy specifically provides that coverage under the "Premises-Operations" hazard does not apply to the "Products-Completed Operations" hazard.

"Products-Completed Operations" is *one* classification or division of coverage, an entity, available under the policy in question, i.e., one could not purchase coverage thereunder against the "Products" hazard alone, nor against the "Completed Operations" hazard alone. (Of course, it is undisputed that Coleman did not elect to purchase coverage against these combined hazards.) The "Products" hazard applies to products sold by the insured, if the accident occurs after possession of such products has been relinquished to others by the insured

and if such accident occurs away from premises owned, rented or controlled by the insured. The "Completed Operations" hazard applies to operations, if the accident occurs after such operations have been completed or abandoned and occurs away from premises owned, rented or controlled by the insured. In connection with such coverage, the policy also provides that "operations shall not be deemed incomplete because improperly or defectively performed . . ." It was and is the contention of petitioner that the occurrence alleged would fall within the "Products-Completed Operations" hazard; that since the insured did not purchase coverage against the "Products-Completed Operations" hazard, and since the policy specifically provides that the "Premises-Operations" hazard and the "Products-Completed Operations" hazard are mutually exclusive, there was no insurance against the occurrence involved under the policy issued by petitioner.

The District Court held on May 9, 1962, that coverage was provided by the insurance policy under the circumstances and that the declaratory relief sought by appellant ought to be denied (R.23). Upon appeal, the Court of Appeals affirmed (R.1A) on April 19, 1963, Appendix B, *infra*, p. 14. A timely petition for rehearing (R.11A) was served and filed by appellant, Appendix D, *infra*, p. 24, and rehearing was denied by the Court of Appeals on May 20, 1963 (R.19A), Appendix E hereto, *infra*, p. 32.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to require this court, in the exercise of its power of supervision of the federal judiciary, to intervene.

The opinion of the Court of Appeals is predicated upon a completely erroneous premise; one that goes far beyond any permissible limits and is directly contrary to the undisputed facts. The effect is the same as if the court had said: "Since black is white, our conclusion must follow".

Petitioner's policy of insurance (R.11) provides for coverage as follows:

> "In consideration of the payment of the premium and the statements contained in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy, the ST. PAUL FIRE AND MARINE INSURANCE COMPANY herein called the Company, AGREES, with the Insured, named in the declarations made a part hereof:
>
> INSURING AGREEMENTS
>
> I. Coverage A — Bodily Injury Liability
>
> To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the hazards hereinafter defined."

Provision is also made for coverage for property damage liability.

The insured purchased coverage only against the "Premises-Operations" hazard, which is defined under "Definition of Hazards" as "The ownership, maintenance or use of premises, and all operations".

The insured did not purchase coverage against the "Products-Completed Operations" hazard. This hazard relates to liability arising from accidents which occur "away from premises owned, rented or controlled by the Named Insured" and arising from goods or products or from operations of the insured that have been completed or abandoned.

Under a section of the policy captioned "EXCLUSIONS" it is specifically stated that the policy does not apply "(c) under Division 1 of the Definition of Hazards [Premises-Operations], * * *, to * * * (2) the Products-Completed Operations Hazard; * * *."

The insured who purchases "Premises-Operations" coverage is protected against liability arising out of any accident that occurs on the premises and any accident that occurs anywhere during the course of the operations of the insured. If one desires to be protected against liability arising out of an accident that occurs away from the premises and after the operations have been completed or abandoned, he must purchase "Products-Completed Operations" coverage, since the policy provides ("Item 3," under "DECLARATIONS"):

> "The insurance afforded is only with respect to such and so many of the following coverages and divisions thereunder as are indicated by specific premium charge or charges."

The basic issue that was presented to the Court of Appeals was whether, under the undisputed facts, the accident arose out of completed operations and occurred away from premises owned, rented or controlled by the Named Insured. If so, it would fall within the "Products-Completed Operations" hazard, against which hazard the

insured did not purchase protection, and would not be covered under the "Premises-Operations" coverage that the insured did purchase.

Instead of resolving this clear-cut issue, the Court of Appeals held that liability for accidents occurring away from the premises was *excluded* from the "Products-Completed Operations" hazard, but that this *exclusion* could not be "read into the 'Premises-Operations' coverage".

In stating the problem, the Court of Appeals said:

> "The primary issue presented herein is whether the District Court erred in not declaring such 'occurrence' happened away from 'premises owned, rented or controlled' by its name insured, and therefore within exclusions of the 'Products-Completed Operations' coverage as defined in that liability policy. Concededly, under the policy here in suit, appellant assumed no liability for 'Products-Completed Operations'" (R.2A).

There is not, and never has been, any such issue, because no such "exclusions" exist. Liability for an accident occurring away from the premises is specifically *included* within the "Products-Completed Operations" hazard, not *excluded*.

This basic fallacy is reiterated frequently throughout the opinion of the Court of Appeals:

> "The gist of appellant's assertion of non-coverage for the 'occurrence' is that the above facts establish appellees' claims to be within the 'Products-Completed Operations' coverage of its policy. That coverage has an *exclusion* contained therein that 'if the accident occurs after possession of such goods or products (i.e. those 'manufactured, sold,

handled or distributed by the Named Insured') has been relinquished to others . . . and if an accident occurs away from premises owned, rented or controlled by the Named Insured' coverage for such an 'occurrence' is not afforded by its policy" (R.4A). (Italics supplied).

"Under the terms of appellant's policy, 'Products-Completed Operations' is the only coverage related to 'away from premises' *exclusion*. There is no such limitation or *exclusion* from coverage as to 'Premises-Operations'. Appellant's attempt to read that limitation into the 'Premises-Operations' coverage is not justified by any rule of construction known to us." (R.7A). (Italics supplied).

"We reject appellant's contention that coverage for the 'occurrence' in question is within 'Products-Completed Operations' hazards as defined in its policy; and, that the *exclusions* relating to that hazard are to be read into the 'Premises-Operations' coverage of its policy." (R.8A). (Italics supplied).

"By the terms thereof, a specific *exclusion* appears for occurrences away from premises when related to 'Products-Completed Operations' hazards. (R.8A). (Italics supplied).

"Appellant's contention that the *exclusion*, 'away from the premises owned, rented or controlled' by its 'Named Insured' should be construed as being within the coverage of 'Premises-Operations' hazards afforded by its policy under the facts here is wholly without merit." (R.9A). (Italics supplied).

Along with these repeated references to a non-existent *exclusion*, the Court of Appeals states:

> "As to the above stated 'Premises-Operations' hazards, there is no provision of the policy coupling the definition thereof, with that of 'Products-Completed Operations.' Appellant by its brief does not undertake to factually demonstrate that 'Premises-Operations" and 'Products-Completed Operations' are correlated, defined hazards". (R.7A).

The entirely fallacious basis of the court's opinion is compounded by this statement. The definitions of these two separate and distinct hazards are "coupled" to the extent that the policy specifically provides that one does not include the other. They are "correlated" to the extent that they are mutually exclusive.

2. The type of coverage involved here has been the subject of numerous judicial opinions. For example, see *Standard Accident Insurance Company* v. *Roberts* (8 Cir. 1942), 132 F. 2d 794; *Dixie Furniture Company* v. *Central Surety & Insurance Company* (D.C. Ark. 1959), 173 F. Supp. 862, affirmed 272 F. 2d 190 (8 Cir.-1959); *Tidewater Associated Oil Co.* v. *Northwest Casualty Co.* (9 Cir.-1959), 264 F. 2d 879; and *Betts* v. *General Accident Fire & Life Assur. Corp.* (9 Cir.-1960), 282 F. 2d 542. (Brief of appellant in Court of Appeals pp. 12-14, 14-12, 14-16, certified separately and ten copies filed here by petitioner.)

Standard Accident Insurance Company v. *Roberts*, *supra*, and *Dixie Furniture Company* v. *Central Surety & Insurance Co.*, *supra*, were decided in the Eighth Circuit in 1942 and 1959, respectively, and the instant opinion is in direct conflict with these earlier opinions of the Court of Appeals for the Eighth Circuit. The instant opinion

is also in direct conflict with the decisions of the Courts of Appeals for the Ninth Circuit in *Bitts v. General Accident & Life Assur. Corp.*, *supra*, and *Federated Associated Oil Company v. Northwest Casualty Company*, *supra*.

Admittedly, because of the manner in which the issue has become confused in the instant opinion, the existence of the conflict must be asserted on the basis of the contrary results alone, and is not, therefore, too clear-cut, but petitioner submits that the conflict does exist.

3. The type of coverage and the general policy form involved here are in widespread use throughout the business community of the United States and are provided by numerous insurers. Naturally, it is important to petitioner that it not be exposed to a potential loss that could exceed $50,000,000 on the basis of an opinion founded upon patent misconceptions. However, it is of even greater importance that a court not misconstrue a contract that is in common use throughout the insurance industry and the business community. This opinion involves far more than an isolated contract, and the effect of the opinion will extend far beyond the parties involved in this litigation.

Before concluding, it should be emphasized that the question here differs somewhat from the usual one of the extent of coverage provided by an insurance policy. Insurance against the particular risk involved here was available to the insured in the very policy that was issued to him. He elected not to purchase such coverage and did not pay a premium for it. The opinion of the Court of Appeals concedes that the insured did not purchase coverage against the "Products-Completed Operations" hazard (R. 2A).

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

ALSTON JENNINGS

1600 Tower Building
Little Rock, Arkansas

Counsel for Petitioner

APPENDIX A

JUDGMENT OF THE UNITED STATES DISTRICT COURT

Filed May 9, 1962

On this May 9, 1962, this case having been submitted upon the stipulation of facts, the pleadings, and the briefs of the parties in support of their respective contentions, and having considered the same, the court has prepared and filed herein its opinion relative thereto, and in accordance therewith,

It is ordered and adjudged that the policy of insurance No. 3222N0126, issued by the plaintiff on June 18, 1960, covers the occurrence of June 6, 1961, alleged in the complaints filed in the Circuit Court of Pulaski County, Arkansas, Case Nos. 61100, 61101, and 61295, and that the plaintiff shall defend the said suits against the insureds and shall pay on behalf of the insureds all sums within the limits of the policy which the insureds shall become legally obligated to pay for personal injuries and property damage.

It is further ordered and adjudged that the complaint of the plaintiff be and hereby is dismissed, and that the defendants have and recover of and from the plaintiff all of their costs herein expended.

Jno. E. Miller

United States District Judge

APPENDIX B

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 17106

St. Paul Fire and Marine Insurance Company,

Appellant,

v.

Willis P. Coleman and Anne Wyles Coleman, d/b/a Lake Hamilton Marine Service, Morgan Agar, James E. Stover, Sr., William T. Stover, II, James E. Stover, Jr., Vicki Ann Stover, Joe G. Fetzek, Virginia M. Fetzek, Mary Catherine Fetzek, Virginia Linda Fetzek, Joseph T. Fetzek and William T. Stover,

Appellees.

Appeal from the United States District Court for the Western District of Arkansas.

[April 19, 1963.]

Before VOGEL, BLACKMUN and RIGG, Circuit Judges.

RIGG, Circuit Judge.

This appeal is from a judgment dismissing appellant's complaints seeking a declaratory judgment that the "oc-

currence" hereinafter described is not within the scope of coverage provided by its "Manufacturer's and Contractor's Liability Policy" issued to "Willis P. and Anne Wyles Coleman, d/b/a Lake Hamilton Marine Service" as named insured.

The primary issue presented herein is whether the District Court erred in not declaring such "occurrence" happened away from "premises owned, rented or controlled" by its named insured, and therefore within exclusions of the "Products—Completed Operations" coverage as defined in that liability policy. Concededly, under the policy here in suit, appellant assumed no liability for "Products—Completed Operations". Appellees do not assert that it did. They affirm that the "occurrence" in question arose from "business operations" hazards created by appellant's "Named Insured" in relation to the "ownership, maintenance or *use* of premises and *all* operations," as those hazards are defined and coverages provided therefor in appellant's policy.

Since there is no dispute between the parties as to the facts leading up to the "occurrence" in question; and District Judge Miller in his memorandum opinion, found at 204 F.Supp. 713, has set forth all the stipulated facts giving rise thereto, as well as a verbatim copy of the relevant "coverage" and "Insuring agreements" contained in the policy of insurance here to be considered, we appropriate his statement of the facts there made and incorporate the same herein by reference, thereby shortening what would otherwise require an extended opinion from us in the disposition of this appeal.

But, to give some continuity to the instant opinion, we think the background facts should be related: On June 6, 1961, an inboard motorboat owned by William T.

Stover caught fire and burned on Lake Hamilton, near Hot Springs National Park, Arkansas. Seven passengers were in that boat, in addition to Stover. All the occupants thereof suffered personal injuries as a result of the fire. As a consequence, suits were filed in the court of the State of Arkansas by all those injured parties, naming appellee Willis P. Coleman, d/b/a Lake Hamilton Marine Service, and Morgan Agar, an employee of Coleman, as defendants. It was alleged in each of the complaints filed in those lawsuits that the fire and resulting injuries to the occupants of the boat were proximately caused by negligence on the part of Agar, which specific claim of negligence was imputed to Coleman, appellant's named insured. In due course, Coleman called upon appellant to defend the lawsuits arising out of that "occurrence" and to pay any judgments that might be recovered in the actions commenced against him, up to the limits of liability provided by its policy. Appellant, after denying that the "occurrence" was within the coverage of its policy, brought the instant action in the United States District Court for the Western District of Arkansas, seeking a declaratory judgment to have that issue determined with finality. The District Court denied appellant declaratory relief as prayed. It ruled that under the particular circumstances here established, coverage for the above "occurrence" was provided by appellant's insurance policy.

The agreed-to facts establish that, prior to the fire, Stover had moored his boat at Coleman's boat-dock for the purpose of refueling. Agar, Coleman's employee, acting in the scope of his employment, undertook to perform that operation. In so doing, when he removed the cap from the gas tank of Stover's boat, he also disconnected the pipe between the cap and the gasoline tank. As a

consequence, in performing the operation of refueling, a portion of the intended fuel missed the tank and ran down into the bilge of the boat. It is Agar's negligent performance of that operation which is asserted by appellees to be the proximate cause of their injuries and a "hazard" within the ambit of "Premises—Operations" coverage afforded by appellant's policy.

The gist of appellant's assertion of non-coverage for the "occurrence" is that the above facts establish appellees' claims to be within the "Products—Completed Operations" coverage of its policy. That coverage has an exclusion contained therein that "if the accident occurs after possession of such goods or products (i.e. those 'manufactured, sold, handled or distributed by the Named Insured') has been relinquished to others . . . and if an accident occurs away from premises owned, rented or controlled by the Named Insured" coverage for such an "occurrence" is not afforded by its policy. Appellant factually buttresses its argument as to that contention in item 10 of the stipulated facts (t.c. 716) and "Division 4 . . . Products—Completed Operations" (t. c. 718) set forth in Judge Miller's opinion, *supra*. That is to say, solely because Stover's boat had drifted a distance of seventy-three feet from the dock when it caught fire as a result of the negligent refueling "operation" by Agar, appellant contends that such "occurrence" was not on property "owned, rented or controlled" by the named insured. However, appellant concedes that Coleman at times had "used the waters" of Lake Hamilton where the fire occurred, for the "mooring" of boats and had a "right to so use those waters in the "operations" of his "business". But it says, "such right of use does not establish that Coleman 'controlled' the waters" where the fire occurred. It is from that singular premise of "control" that appellant asserts "non-coverage," under its in-

bility policy. We do not believe that the place where the Stover boat was located when it caught fire as a result of Agar's negligence, is decisive of appellant's liability coverage under the facts here and the insuring provisions of its policy.

To bring that basic issue into clearer mental focus it should be noted that there are several different classifications or "divisions" of risks set forth in appellant's policy as reproduced at 204 F.Supp. l.c. 717. We are here concerned only with "Premises—Operations" and "Products—Completed Operations." It should be clearly understood that appellees make no claim of coverage under appellant's policy for "Products—Completed Operations" hazard as defined therein. It is appellant alone who undertakes to steer the personal injury claims made against its "Named Insured" into that channel of coverage. It asserts that the decision of the District Court is predicated on a ruling that coverage for the above "occurrence" was within "Products—Completed Operations" because the opinion of the trial court contains the statement that "gasoline was never delivered to the operator of the boat" and that "as a practical matter, the gasoline" that found its way into "the bilge of the boat could not be construed as being in possession of the operator of the boat". As a consequence, appellant states:

> "In spite of these statements (by the District Court), it seems quite clear that the accident occurred 'after possession of such goods or products has (sic)been relinquished to others by the Named Insured,' and, if the injured parties alleged a claim against the insured because of the *nature* or *condition* of the Product, it would still be necessary to determine only whether the *accident* occurred 'away' from the premises owned, rented or controlled by the Named In-

sured," *which is the same question presented under the "Completed Operations" hazard" of its policy.* (Par. and Emp. added.)

We consider the above argument to be not only a misinterpretation of Judge Miller's opinion, *supra*, but also the italicized parts thereof are an erroneous interpretation of the "Insuring Agreements" contained in its policy of insurance. First, because the appellees do not make any claim that they were injured "because of the *nature* or *condition*" of the gasoline sold to Stover. Secondly, it appears from Judge Miller's opinion that he found the negligent act of Agar which occurred at Coleman's dock to be in relation to "Business Operations" of Coleman, and that such was the proximate cause of the fire and injury to those in Stover's boat. True, his opinion contains the statements *ante*, but it is apparent from his opinion considered as a whole that such statements were made in relation to his consideration of the facts, that the fire occurred within the confines of an area of the waters of Lake Hamilton used by Coleman in doing business as "Lake Hamilton Marine Service." That is, in an area where Coleman had "moored" boats of some customers in the course of his business operations. We need not sound out the "area" of Coleman's business operations as Judge Miller apparently did. All we here note is that the "location of all premises owned, rented or controlled by the Named Insured" is not defined in appellant's policy. From the facts in the case at bar, a reasonable inference can be made that the policy as issued was intended to cover all of Coleman's business "operations"; and that appellant knew or should have known that he "used" the waters of Lake Hamilton, where the fire occurred, in the operations of his business and had a right to do so. Regardless, the place where the fire "occurred" is not here controlling under the "Premises—Operations" coverage afforded by appellant's policy.

An examination of the divisions of coverage of that policy reveals "Premises—Operations" to be a hazard and risk listed separate and apart from "Products—Completed Operations." That establishes that there is a recognized difference between those two defined coverages. Such difference is further recognized in the fact that the policy provides for a different rate of premium to be paid for those divisions of coverage. Further, in the "Definition of Hazards" (204 F.Supp., l.c. 718) as related to "Premises—Operations," the policy specifically reveals that hazards insured thereunder are related to "the ownership, maintenance or *use* of premises, and *all operations*." (Emp. added.) From this latter provision alone it is established that the term "all operations" was intended to include "activities" performed in relation to "use of premises" by the named insured in relation to his business operations, namely: "Boat Yards—Public—including sale of boats, accessories, gasoline and oil, boat building and repair. Boat storage and moorage including ship or dock rental" as defined in the declaration of the Policy. As to the above-stated "Premises—Operations" hazards, there is no provision of the policy coupling the definition thereof with that of "Products—Completed Operations." Appellant by its brief does not undertake to factually demonstrate that "Premises—Operations" and "Products—Completed Operations" are correlated, defined hazards. All that it does is articulate "that the same question presented under the Products—Completed Operations of its policy applies to Premises—Operations." We do not believe its policy is subject to that interpretation.

Under the terms of appellant's policy, "Products—Completed Operations" is the only coverage related to "away from premises" exclusion. There is no such limitation or exclusion from coverage as to "Premises—Operations." Appellant's attempt to read that limitation into the

"Premises—Operations" coverage is not justified by any rule of construction known to us. An unbiased reading of appellant's policy must convince a reasonable mind that such is not a proper legal interpretation thereof. For certain, the most that can be said regarding appellant's contention is, that if its policy is to be so construed, then it is certainly "ambiguous" and any such ambiguity is to be resolved against it. *O'Connor* v. *Great Lakes Pipe Line Co.* 63 F.2d 523 (8 Cir. 1933); *Art* v. *London & Lancaster Indemnity Co.*, 131 F.2d 370; *Zurich General Accident & Liability Co.* v. *Simms*, 194 Ark. 676, 109 S.W.2d 933. We reject appellant's contention that coverage for the "occurrence" in question is within "Products—Completed Operations" hazards as defined in its policy; and, that the exclusions relating to that hazard are to be read into the "Premises—Operations" coverage of its policy.

The sum and substance of appellant's contention of non-coverage under the latter hazard is that . . . assuming the gasoline transferred from Coleman's pumps to Stover's boat by Agar was a negligent operation, yet it says the fire resulting from that operation, having occurred after Stover's boat moved some seventy feet from the Coleman dock, was not within the coverage of its policy because it was "away from the premises owned, rented or controlled by the Named Insured." That is tantamount to saying that negligent "Premises—Operations" being the proximate cause of an injury is the same as "Products—Completed Operations." That is not so. The differences between "Premises—Operations" and "Products—Completed Operations" are clearly defined as separate hazards in appellant's policy. By the terms thereof a specific exclusion appears for occurrences away from premises when related to "Products—Completed Operations" hazards. But language so providing does not avoid coverage provided therein for the specifically defined "Premises—

Operations" hazard. Appellant has not sustained the burden of establishing that the negligent "Premises—Operation" performed by Agar, which is established to be the proximate cause of the "occurrence" in question, is excluded from coverage under its policy: *Zurich General Accident & Liability Ins. Co., Ltd.* v. *Simms*, *supra*.

Appellant's contention that the exclusion, "away from the premises owned, rented or controlled" by its "Named Insured" should be construed as being within the coverage of "Premises—Operations" hazards afforded by its policy under the facts here is wholly without merit. Cf. *Employer's Liability Assurance Corp., Ltd.* v. *Youghiogheny & Ohio Coal Co.*, 214 F.2d 418 (8 Cir. 1954) affirming 114 F.Supp. 472; *Southwestern Indemnity Co.* v. *National Surety Corp.*, 277 F.2d 545 (5 Cir. 1960); *Travelers & General Ins. Co.* v. *Rudco Oil & Gas Co.*, 129 F.2d 621 (10 Cir. 1942); *Clauss* v. *American Automobile and Insurance Co.*, 175 F.Supp. 641 (E.D. Penna. 1959); *American Fidelity & Cas. Co.* v. *Travelers & General Insurance Co.*, 334 S.W.2d 772 (Texas, 1959); *Associated Indemnity Corp.* v. *National Surety Corp.*, 287 S.W.2d 714 (Texas, 1956); *Cooper Butane Co., Ltd.* v. *Pan American Insurance Co.*, 290 S.W.2d 919 (Texas, 1956).

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

(Judgment)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,106. September Term, 1962.

St. Paul Fire and Marine Insurance Company,

Appellant,

vs.

Willis P. Coleman and Anny Wyles Coleman
d/b/a Lake Hamilton Marine Service,
Morgan Agar, James E. Stover, Sr.,
William T. Stover II, James E. Stover, Jr.,
Vicki Ann Stover, Joe G. Fetzek, Virginia
M. Fetzek, Mary Catherine Fetzek, Virginia
Linda Fetzek, Joseph T. Fetzek, and
William T. Stover,

Appeal from the United States District Court for the Western District of Arkansas.

This Cause came on to be heard on the record from the United States District Court for the Western District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 19, 1963.

APPENDIX D

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17106

CIVIL

ST. PAUL FIRE AND MARINE INSURANCE COMPANY — *Appellant*

v.

WILLIS P. COLEMAN, ET AL. — *Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

APPELLANT'S PETITION FOR REHEARING

Appellant respectfully petitions for rehearing in the absolute belief that the Court, upon re-examination of its opinion of April 19, 1963, will readily agree that the opinion should be withdrawn irrespective of the ultimate outcome of the appeal. Of course, appellant believes that the ultimate outcome should be reversal in view of undisputed evidence and applicable decisions of this Court.

It is respectfully submitted that the Court's opinion misconstrues (1) the makeup and contents of the insurance policy; (2) the appellant's contentions; (3) the decision of the District Court; and (4) the applicable law.

The opinion is predicated upon a completely erroneous premise that there exists in the insurance policy an *exclusion* which excludes from "Products-Completed Operations" coverage an occurrence away from "premises owned, rented or controlled" by the named insured, and that the appellant has so urged.

In the second paragraph of its opinion (p.2), the Court defines the "primary issue presented" to be whether the occurrence is "within *exclusions* of the '*Products-Completed Operations*' *coverage*" in the liability insurance policy. (Italics supplied)

On page 8 of its opinion, the Court says:

> "We reject appellant's contention . . . that the exclusions relating to that hazard [Products-Completed Operations] are to be read into the 'Premises-Operations' coverage of its policy."

Contrary to the Court's repeated statements, insurance for occurrences "away from premises owned, rented or controlled by the Named Insured" *is provided* under "Products-Completed Operations" coverage. As opposed to being *excluded*, insurance coverage for occurrences away from the premises is specifically *included*, for that is the very heart of the protection provided when the insured chooses to buy "Products-Completed Operations" coverage. By the terms of the policy, when this particular coverage is purchased, the insured is protected against legal liability caused by accident and arising out of "(2) Operations, if the accident occurs after such op-

erations have been completed or abandoned and occurs away from premises owned, rented or controlled by the Named Insured: * * *"

It was, therefore, a surprise to appellant and its attorney to read in the Court's opinion [illegible] that the "Products-Completed Operations" coverage "has an exclusion contained therein that * * * if an accident occurs away from premises owned, rented or controlled by the Named Insured coverage for such an 'occurence' is not afforded by its policy."

Just the opposite is true. What the Court is describing as an "exclusion" from the "Products-Completed Operations" insurance coverage is, in fact, one of the basic risks insured against by the coverage provided by that portion of the policy, if the insured elects to purchase such protection. The whole point in this appeal is that an insured is entitled only to such protection as he elects to purchase and pay a premium for; and this insured did not purchase protection against an occurrence away from the premises because he did not purchase "Products-Completed Operations" coverage. If he had purchased that coverage, he would have been protected. Appellant has never contended otherwise.

The "Products-Completed Operations" hazard embraces two separate, though related, hazards and combines them into one division of the policy and makes them available as an entity if the insured desires to purchase such protection.

There is first the "Products" liability insurance which gives protection with respect to claims usually related to consumption or use, arising out of "goods or products manufactured, sold, handled or distributed by

the Named Insured or by others trading under his name, if the accident occurs after possession of such goods or products has been relinquished to others * * * and if such accident occurs away from premises owned, rented or controlled by the Named Insured * * *." An example would be claims involving the purchase of a bottled soft drink, with the purchaser taking it home, drinking it, and finding a foreign substance therein.

The second hazard for which protection is provided under "Products-Completed Operations" involves liability arising out of "(2) Operations, if the accident occurs after such operations have been completed or abandoned and occurs away from premises owned, rented or controlled by the Named Insured: * * *". For example, an automobile repairman, after completing repairs, might be presented with a claim arising out of a traffic accident on a public street upon the ground that the accident was caused by negligence on his part in repairing the vehicle.

It will be noted that whether the claim involves "Products" or "Completed Operations" the coverage applies to an occurrence away from premises. For that reason, appellant has asserted (Appellant's Brief p. 10) that the same question is involved in both the "Products" and the "Completed Operations" coverage. However, the Court's opinion (p.7) is incorrect in attributing to appellant the statement "that the same question presented under the Products-Completed Operations of its policy applies to Premises Operations". Appellant has never made such a contention or statement. It is appellant's contention, based upon the provisions of the policy, that "Products-Completed Operations" coverage, on the one hand, and "Premises-Operations" coverage on the other hand, are mutually exclusive.

At page 7 of its opinion, the Court says:

> "As to the above stated 'Premises-Operations' hazards, there is no provision of the policy coupling the definition thereof with that of 'Products-Completed Operations.' Appellant by its brief does not undertake to factually demonstrate that 'Premises-Operations' and 'Products-Completed Operations' are correlated, defined hazards."

This statement is erroneous. The definitions of these two separate and distinct hazards are "coupled" to the extent that the policy specifically provides that one does not include the other. As previously stated, they are "correlated" to the extent that they are mutually exclusive. The policy specifically states (R.11) that it does not apply "(c) under Division 1 of the Definition of Hazards [Premises-Operations], * * * to * * * (2) the Products-Completed Operations Hazard; * * *." In short, appellant contends that the terms of the policy exclude coverage for the occurrence involved here under "Premises-Operations" because such an occurrence is *included* under "Products-Completed Operations", but that the insured did not buy "Products-Completed Operations" coverage. This is diametrically opposite to the contention set forth in the Court's opinion that coverage under "Premises-Operation" does not apply because the occurrence is *excluded* under "Products-Completed Operations".

Additional quotations from the opinion which indicate that the Court is proceeding upon the erroneous premise that an occurrence away from the premises is excluded from the "Products-Completed Operations" coverage, are set out below:

"Under the terms of appellant's policy, 'Products-Completed Operations' is the only coverage related to 'away from premises' *exclusive*. There is no such limitation or *exclusion* from coverage as to 'Premises-Operations'. Appellant's attempt to read that *limitation* into the 'Premises-Operations' coverage is not justified by any rule of construction known to us." (Opinion pp. 7-8). (Italics supplied).

"We reject appellant's contention that coverage for the 'occurrence' in question is within 'Products-Completed Operations' hazards as defined in its policy; and that the *exclusions* relating to that hazard are to be read into the 'Premises-Operations' coverage of its policy." (Opinion p. 8). (Italics supplied).

"By the terms thereof a specific *exclusion* appears for occurrences away from premises when related to 'Products-Completed Operations' hazards. (Opinion pp. 8-9). (Italics supplied).

"Appellant's contention that the *exclusion* 'away' from the premises owned, rented or controlled' by its 'Named Insured' should be construed as being within the coverage of 'Premises-Operations' hazards afforded by its policy under the facts here is wholly without merit." (Opinion p. 9). (Italics supplied).

Such an "exclusion" does not, in fact, exist, and appellant has never asserted that it does.

Another surprise in the Court's opinion is on page 6 where it is said that "from the facts in the case at bar, a reasonable inference can be made that the policy as issued was intended to cover all of Coleman's 'business operations'". Such a finding, of course, gives to the insured the benefit of "Completed Operations" coverage, *which he did not buy.*

The policy is so designed that an insured may procure coverage under four "Divisions". The insured may purchase coverage under one "Division"; all of them or so many as he desires. Naturally, the amount of the total premium will vary, depending upon what coverage is purchased and the number of "Divisions" that the insured elects. This particular insured elected to be covered *only* under Division 1. A ruling that he is protected against a hazard falling under another Division without paying a premium for such protection, is obviously unfair to the insurer and to other insureds who are required to pay a premium for such protection.

If this Court, as the opinion indicates, is in agreement that this accident occurred after the insured's operations had been completed or abandoned and that the accident occurred away from premises owned, rented or controlled by the Named Insured, then the inevitable conclusion is that there is no coverage, and the judgment of the District Court ought to be reversed.

The basis of Judge Miller's holding was that: "Under these facts the Court cannot say that the accident occurred away from the premises owned, rented or controlled by the insured" (R.40). If that is a correct conclusion from the undisputed facts, then the decision below is a correct one for that reason standing alone. However, the appellant's argument to this Court is simply that such a conclusion is erroneous in the light of the undisputed and agreed facts and that it is in direct conflict with the decisions of this Court in *Standard Accident Insurance Company* v. *Roberts* (8 Cir. 1942), 132 F. 2d 794, and *Dixie Furniture Company* v. *Central Surety & Insurance Company* (D.C. Ark. 1959), 173 F. Supp. 862, affirmed 272 F. 2d 190.

Appellant respectfully prays the Court that rehearing be granted; that the Court permit re-argument of this cause; and that, thereafter, the judgment of the District Court be reversed.

Respectfully submitted,

Alston Jennings
1500 Tower Building
Little Rock, Arkansas

Attorney for Appellant

CERTIFICATE

I, Alston Jennings, attorney for appellant, hereby certify that the above and foregoing petition for rehearing is submitted in good faith and because it is believed to be meritorious and not for any purpose of vexation or delay.

Alston Jennings

Alston Jennings

APPENDIX E

(Order Denying Petition of Appellant for a Rehearing)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17106 September Term 1962

St. Paul Fire and Marine Insurance Company, Appellant, vs. Willis P. Coleman, et al.	Appeal from the United States District Court for the Western District of Arkansas.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

May 20, 1963.